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No. 96-985

In the Supreme Court of the United States

OCTOBER TERM, 1996

ANTONIO CESAR CHAMORRO-TORRES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which prohibits courts from reviewing final deportation orders against aliens convicted of certain serious crimes, divested the courts of appeals of jurisdiction over petitions for review that were pending at the time of its enactment.

2. Whether Section 440(a) of the AEDPA violates the Due Process Clause of the Fifth Amendment and the separation of powers doctrine.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is not reported. The opinions of the Board of Immigration Appeals (Pet. App. 3-7) and the immigration judge (Pet. App. 8-11) are also not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1996. The petition for a writ of certiorari was filed on December 16, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Chile, was admitted to the United States as a lawful permanent resident in 1977, based on his marriage to a United States citizen. On November 2, 1990, in the United States District Court for the Southern District of Texas, he was convicted of laundering money, in violation of 18 U.S.C. 1956(a)(1)(A), and was sentenced to 51 months' imprisonment. Pet. App. 3-4.

2. In August 1993, the Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner on the ground that his conviction for money laundering rendered him deportable under Section 241(a)(2)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(B)(i), as an alien convicted of a crime relating to a controlled substance. Petitioner admitted the conviction and conceded deportability, but requested a waiver of deportation under Section 212(c) of the INA, 8 U.S.C. 1182(c). The immigration judge granted the requested relief. Pet. App. 8-11.

3. After reviewing the matter *de novo*, the Board of Immigration Appeals (BIA) concluded that petitioner was statutorily ineligible for discretionary relief from deportation. Pet. App. 3-7. The BIA pointed out that, in October 1988, petitioner and his family had sold all of their belongings in this country, and moved back to Chile "to establish a better life for [the] family." *Id.* at 4. Although petitioner ultimately returned to the United States in October 1989, the BIA concluded that, because of his one-year hiatus in Chile, petitioner lacked the seven years' unrelinquished domicile in this country required by Section 212(c). Pet. App. 5-6. Accordingly, the BIA vacated

the immigration judge's decision, denied petitioner's application for relief, and ordered his deportation. *Id.* at 6-7.

On November 13, 1995, petitioner filed a petition for review of that final deportation order.

4. At the time of the BIA's decision, Section 106(a)(1)-(6) of the INA, 8 U.S.C. 1105a(a)(1)-(6), authorized review of final orders of deportation in the courts of appeals, and Section 106(a)(10) of the INA, 8 U.S.C. 1105a(a)(10), authorized the district courts to entertain petitions for writs of habeas corpus filed by aliens held in custody pursuant to orders of deportation.

On April 24, 1996, while the petition for review was pending in the court of appeals, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 401(e) of the AEDPA repealed INA Section 106(a)(10)'s special provision for habeas jurisdiction, 110 Stat. 1268, and Section 440(a) of the AEDPA amended Section 106(a)(10) to exclude from judicial review final orders of deportation entered against certain classes of criminal aliens, 110 Stat. 1276. As amended by the AEDPA, Section 106(a)(10) read in pertinent part as follows:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) * * * shall not be subject to review by any court.

110 Stat. 1276-1277. Section 440(d) of the AEDPA, in turn, amended INA Section 212(c) to eliminate the Attorney General's authority to grant relief from deportation to any alien who "is deportable by reason

of having committed any [such] criminal offense." 110 Stat. 1277. Petitioner, as noted, is deportable under Section 241(a)(2)(B)(i) of the INA, 8 U.S.C. 1251(a)(2)(B)(i), by reason of having committed a crime related to a controlled substance.

5. On September 17, 1996, the court of appeals summarily dismissed the petition for review for lack of jurisdiction. Pet. App. 1.

ARGUMENT

1. Contrary to petitioner's argument (Pet. 4), the court of appeals correctly recognized that Section 440(a) of the AEDPA divested it of jurisdiction over petitioner's petition for review, which was pending at the time of the AEDPA's enactment. That issue is, moreover, of little continuing importance, since presumably there are few such cases remaining that were pending in the courts of appeals when the AEDPA was enacted nine months ago, yet have not been finally disposed of under Section 440(a) of the Act. This Court recently denied certiorari in a case raising the same issue. See *Mendez-Rosas* v. *INS*, cert. denied, No. 96-6076 (Jan. 6, 1997). There is no reason why this case should be treated differently.

a. With the exception of the Seventh Circuit, which deviated from the others in a limited respect not applicable here, every court of appeals that has considered the matter has concluded that Section 440(a) of the AEDPA operated immediately upon its enactment to divest the courts of jurisdiction to review final orders of deportation, resulting in the dismissal of petitions then pending before them. See *Kolster* v. *INS*, 101 F.3d 785, 787-791 (1st Cir. 1996); *Salazar-Haro* v. *INS*, 95 F.3d 309, 310-311 (3d Cir. 1996); *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 29 (2d Cir.

1996); *Duldulao* v. *INS*, 90 F.3d 396, 398-400 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 674-676 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997); see also *Sanchez-Rodriguez* v. *INS*, No. 96-9518 (10th Cir. July 12, 1996) (per curiam order dismissing petition for review for lack of jurisdiction); *Rolle* v. *INS*, No. 96-4560 (11th Cir. July 15, 1996) (same); but see *Reyes-Hernandez* v. *INS*, 89 F.3d 490, 492-493 (7th Cir. 1996) (concluding that Section 440(a) did not divest courts of jurisdiction to entertain petitions for review filed by aliens who waived colorable defenses to deportability and sought discretionary relief before the enactment of the AEDPA), discussed at note 3, *infra*.

b. The court of appeals correctly concluded that Section 440(a)'s preclusion of judicial review operated immediately to divest it of jurisdiction to review the petition pending before it. In *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), this Court explained that, "[w]hen a case implicates a federal statute enacted after the events in suit," absent an express provision respecting its temporal reach, the court must determine whether present application of the new statute "would have retroactive effect." *Id.* at 280. If so, it is presumed that Congress did not intend the new statute to apply to that case. *Ibid.* The Court cautioned, however, that the presumption is not a bright-line rule: "[A]pplication of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 273. In particular, the Court noted that "intervening statutes conferring or ousting jurisdiction" are ordinarily given immediate effect, "whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. The Court explained that "[p]resent law normally governs in such situations

because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Ibid.*[1]

Landgraf thus reaffirmed the long-standing tenet that, "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (citing *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Gwin* v. *United States*, 184 U.S. 669, 675 (1902); *Gurnee* v. *Patrick County*, 137 U.S. 141, 144 (1890); *Sherman* v. *Grinnell*, 123 U.S. 679, 680 (1887); *Railroad Co.* v. *Grant*, 98 U.S. 398, 401 (1879); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). See also *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386, 390 (1953) ("When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. * * * If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit."); accord *The Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870); *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541, 544 (1867).

No provision of the AEDPA preserves the courts of appeals' jurisdiction over petitions for review that were pending at the time of its enactment.[2] Accord-

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[1] Accord 511 U.S. at 293 (Scalia, J., concurring in the judgments) ("Our jurisdiction cases are explained * * * by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.").

[2] Section 440(f) of the AEDPA provides that the amendments effected by Subsection (e) (relating to modifications made to the definition of "aggravated felony" in Section

ingly, Section 440(a) operated immediately to eliminate the jurisdiction of the courts of appeals. To the extent that the dismissal of pending petitions may upset the expectations of aliens who anticipated a further level of review, that does not justify a departure from long-settled principles. "A statute does not operate 'retrospectively' merely because it * * * upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269. Irrespective of the disappointment felt by those aliens whose cases were pending on review, Section 440(a) is not retroactive in nature: It speaks to the present power of the courts to review final deportation orders, rather than to the rights of aliens. *Id.* at 274.[3]

101(a)(43) of the INA, 8 U.S.C. 1101(a)(43)) "apply to convictions entered on or after the date of [the AEDPA's enactment]." 110 Stat. 1278. Congress, however, made no express provision respecting the temporal application of the other subsections of Section 440, and the effective date provisions that relate to various other Sections of the AEDPA provide no reliable indication of Congress's intent in that regard. See *Duldulao*, 90 F.3d at 398 n.2; *Mendez-Rosas*, 87 F.3d at 675 & n.4.

[3] The Seventh Circuit lost sight of that principle in *Reyes-Hernandez*. Positing that an alien who had conceded deportability before the enactment of the AEDPA might have deliberately done so in order to apply for discretionary relief, 89 F.3d at 493, it held that "to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal consequence to the concession, an event that occurred before the new law came into existence." *Id.* at 492-493. The court failed to appreciate the import of this Court's observation that jurisdictional statutes apply to cases pending at the time of their enactment because such statutes address the power of the courts, which holds true irrespective of any expectations that a particular alien might have had regarding the availability of further review. See *Landgraf*, 511 U.S. at

c. On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (*reproduced at* 142 Cong. Rec. H11,787-H11,833 (daily ed. Sept. 28, 1996)), which effected a sweeping overhaul of the INA. Section 306(b) of IIRIRA repeals Section 106 of the INA, which heretofore has governed the review of deportation and exclusion orders (and which Section 440(a) of the AEDPA had amended), and Section 306(a) of IIRIRA replaces it with a new Section 242, which precludes judicial review of removal orders against aliens, like petitioner, who are removable by reason of having committed drug-trafficking-related offenses. IIRIRA § 306(a)(2) (*reproduced at* 142 Cong. Rec. H11,803-H11,804 (daily ed. Sept. 28, 1996)). Be-

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274-275. Contrary to the Seventh Circuit's apparent understanding, moreover, Reyes-Hernandez was free both to contest the grounds of deportability *and*, in the alternative, to seek discretionary relief under Section 212(c) should he be found to be deportable. We therefore share the Second Circuit's skepticism "that any alien concedes deportability only because of the expected possibility of section 212(c) relief and the availability of a petition for review of the denial of such relief." *Hincapie-Nieto*, 92 F.3d at 30. "It is far more likely," as that court recognized, "that deportability is conceded because there is no conceivable defense available." *Ibid.*

In any event, the Seventh Circuit expressly observed that its holding did not extend to circumstances in which the petitioner "does not challenge the fact that he is an alien properly found deportable." *Reyes-Hernandez*, 89 F.3d at 493 (citation omitted). In this case, petitioner does not dispute that he is deportable on the basis of his money-laundering conviction, and the record contains a certified copy of that conviction. See also *Arevalo-Lopez* v. *INS*, No. 96-1754, 1997 WL 1898 (7th Cir., Jan. 3, 1997) (no colorable defense where INS proffered certified conviction records).

cause petitioner's deportation order was entered in 1995, IIRIRA's judicial review provisions do not apply to his case. See IIRIRA § 309(a) and (c)(4) (*reproduced at* 142 Cong. Rec. H11,808 (daily ed. Sept. 28, 1996)), as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 (changes effected by Title III-A of IIRIRA generally become effective on April 1, 1997); see *INS* v. *Yang*, 117 S. Ct. 350, 352 n.1 (1996). IIRIRA's imminent supersession of Section 440(a) of the AEDPA, however, diminishes the legal significance of cases, such as this one, that interpreted the latter provision.

2. Petitioner also argues (Pet. 4-5) that the preclusion of judicial review of final orders of deportation entered against aliens convicted of certain serious crimes violates the Due Process Clause of the Fifth Amendment and the principle of separation of powers. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

a. Contrary to petitioner's argument, the separation of powers doctrine does not require Congress to provide an Article III forum to review all claims that may arise from the BIA's denial of an application for discretionary relief from deportation. Although the judicial power of the United States must be exercised by Article III courts, U.S. Const. Art. III, § 1; see generally *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57-60 (1982) (opinion of Brennan, J.), Congress unquestionably has the power to assign the adjudication of certain matters to administrative agencies. In particular, "there are matters, *involving public rights*, which may be presented in such form that the judicial power is

capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Northern Pipeline*, 458 U.S. at 67 (opinion of Brennan, J.) (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)) (emphasis added in *Northern Pipeline*).

"[T]he public-rights doctrine * * * draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government." *Northern Pipeline*, 458 U.S. at 67 (opinion of Brennan, J.); accord *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929). Congress's plenary authority over matters respecting immigration, and its vesting of adjudicatory authority over immigration matters in administrative agencies, are paradigmatic in that regard. *Northern Pipeline*, 458 U.S. at 69 n.22 (opinion of Brennan, J.) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932)). This Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)); see also *Reno* v. *Flores*, 507 U.S. 292, 305 (1993); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 967 (1988) ("[B]ecause of the longstanding assumption that the executive and legislative branches possess plenary power over immigration issues, the surrounding body of law falls within the public rights category.") (footnote omitted). Because the admission and expul-

sion of aliens involves a public right—indeed a fundamental sovereign right—Congress possesses broad authority to grant or withhold the courts' jurisdiction respecting such matters. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 280 (1922).

Petitioner's reliance on the Due Process Clause of the Fifth Amendment is equally unavailing. Because "[p]olicies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government," *Galvan* v. *Press*, 347 U.S. 522, 531 (1954), legislation respecting immigration must be sustained so long as it is based upon a "facially legitimate and bona fide reason." *Fiallo*, 430 U.S. at 794 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972)). In enacting the AEDPA, Congress was concerned about the delays that attended the process by which deportable criminal aliens are removed from the country. See S. Rep. No. 48, 104th Cong., 1st Sess. 3, 26 (1995) (noting, under a Section entitled "Current Procedures Allow Delay and Abuses of Deportation Process by Criminal Aliens," that the deportation process for criminal aliens "is byzantine," and, under a Section entitled "Overview and Summary of the Investigation," that "[t]here is little reason for the multiple levels of appeal and delay in the deportation process which current law permits"). Section 440(a) was an integral part of Congress's plan to streamline that process and, for the common welfare, expeditiously to deport serious criminal aliens. Those unquestionably are rational legislative ends. See *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982) (acknowledging the government's "weighty" interest in the "efficient administration of the immigration laws"); accord *INS* v. *Rios-Pineda*, 471 U.S. 444, 449-452 (1985).

It is critical to recognize, on the other side of the ledger, that a resident alien has no substantive entitlement to reside in this country; his ability to remain is at the sufferance of Congress. It is a matter not of "right" but of "permission and tolerance." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586-587 (1952). Given the political character of the decision, this Court has long recognized that the determination whether an alien may remain in this country in the future may be made through "appropriate *executive* proceedings." *Ng Fung Ho*, 259 U.S. at 280 (emphasis added); accord *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.'"); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893) ("[A]lthough Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts * * *, yet Congress might intrust the final determination of those facts to an executive officer, and * * *, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted, or to controvert its sufficiency.").[4]

In enforcing the government's immigration policies, the Executive Branch must, of course, "respect

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[4] Citizens, of course, have a substantive right to remain in the United States, and for that reason a judicial forum must be available for bona fide disputes respecting citizenship. See *Ng Fung Ho*, 259 U.S. at 284 ("Jurisdiction in the executive to order deportation exists only if the person arrested is an alien.").

the procedural safeguards of due process." *Galvan*, 347 U.S. at 531. Thus, a resident alien unquestionably has the right to a "hearing on the charges underlying any attempt to exclude him." *Plasencia*, 459 U.S. at 33.[5] This Court has never held, however, that procedural due process guarantees judicial review of an administrative hearing. To the contrary, the Court has made clear that an individual has no such entitlement. See *Ortwein* v. *Schwab*, 410 U.S. 656, 660 (1973) (per curiam) (rejecting due process challenge to filing fee for judicial review of administrative decision; "due process does not require a State to provide an appellate system"); accord *Edward* v. *Paul*, 814 F.2d 52, 55 n.2 (1st Cir. 1987).

b. No court of appeals has accepted petitioner's argument that due process and the separation of powers doctrine require that every aspect of a final order of deportation be subject to direct judicial

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[5] The INA and implementing regulations entitle an alien to notice of the charges and a meaningful opportunity to be heard. See 8 U.S.C 1252(b), 1252a, 1252b; 8 C.F.R. Pt. 3, Subpt. C, and Pt. 242. Specifically, an alien is entitled to a deportation hearing, during which an immigration judge explains the charges, advises the alien as to his eligibility for certain forms of relief from deportation, and informs the alien of his right to be represented by counsel at no expense to the government. See 8 U.S.C. 1252(b); 8 C.F.R. 242.16(a), 242.17(a). If the alien denies deportability at that hearing, the burden is on the Immigration and Naturalization Service (INS) to prove by "clear, unequivocal, and convincing" evidence that the alien is in fact deportable. *Woodby* v. *INS*, 385 U.S. 276, 286 (1966). If the INS prevails in the deportation hearing, the alien may appeal that decision to the BIA, see 8 C.F.R. 3.1(b)(2) and (3), 242.21, which exercises its "own independent judgment in deciding the ultimate disposition" of cases involving discretionary determinations. *In re Burbano*, 20 I. & N. Dec. 872, 873 (BIA 1994).

review. The only court of appeals that has addressed that argument rejected it. See *Duldulao*, 90 F.3d at 399-400. The argument that the Constitution requires the availability of judicial review is especially weak where, as here, the alien has conceded that he is deportable (on the basis of a judgment of conviction in an Article III court), and the only remaining dispute concerns whether he is eligible to be considered for discretionary relief from deportation.

Several courts have indicated that Article I, Section 9, of the Constitution may in certain limited instances require the availability of habeas review. See *Kolster*, 101 F.3d at 790 (Section 440(a)'s elimination of direct judicial review does not offend due process or separation of powers because "any habeas review that is required by the Constitution remains available."); *Salazar-Haro*, 95 F.3d at 311 (due process concerns are satisfied by the availability of constitutionally mandated habeas review); *Hincapie-Nieto*, 92 F.3d at 30-31 (noting that a petitioner may seek relief in habeas, but "express[ing] no opinion on the nature of the remedy or the scope of [habeas] review that remains available in any court"); *Duldulao*, 90 F.3d at 400 n.4 ("The availability and scope of collateral habeas review where the 'paramount law of the Constitution' may require judicial intervention was not an issue before us, and we need not decide whether section 440(a) purports to preclude it.") (citation omitted).

Because the courts of appeals have not yet ruled on what claims (if any) relating to final orders of deportation may be subject to review via a petition for a writ of habeas corpus, that issue does not warrant this Court's review at this time. Even if the availability and breadth of habeas corpus were ripe for review,

moreover, this case would be an inappropriate vehicle for decision, because petitioner has not sought a writ of habeas corpus, and the decision below did not concern such relief.[6] Cf. *Kolster*, 101 F.3d at 791 ("As the nature and scope of habeas review available to aliens like Kolster is not properly before us at this time, we do not reach those questions."); accord *Duldulao*, 90 F.3d at 400 n.4.

3. In any event, further review in this case is unwarranted because the Attorney General no longer has the authority to provide petitioner the relief from deportation that he requested and that was the subject of his petition for review in the court of appeals. Before the enactment of the AEDPA, the final sentence of Section 212(c) stated that discretion-

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[6] We have little doubt that, had petitioner filed a petition for a writ of habeas corpus, it would have been denied, and rightly so. The constitutional writ has historically been available in the deportation context only to redress significant violations of constitutional rights or ultra vires actions exceeding the Attorney General's delegated power or jurisdiction. It has never been thought to extend to claims of lesser errors, such as a lack of substantial evidence to support a decision, an abuse of discretion, or (as here) a claim that the Attorney General or her delegate has misinterpreted a non-jurisdictional statutory provision. See, *e.g.*, *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*. But a want of due process is not established by showing merely that the decision is erroneous.") (citations omitted); *United States ex rel. Tisi* v. *Tod*, 264 U.S. 131, 132-134 (1924) ("Tisi's claim to be discharged on *habeas corpus* rests wholly upon the contention that he has been denied due process of law. * * * [M]ere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law.").

ary waivers were not available to any "alien who ha[d] been convicted of one or more aggravated felonies and ha[d] served for such felony or felonies a term of imprisonment of at least 5 years." 8 U.S.C. 1182(c). Section 440(d) of the AEDPA amended that sentence to provide that Section 212(c) "shall not apply," *inter alia*, to any "alien who is deportable by reason of having committed any criminal offense covered in [INA] section 241(a)(2)(A)(iii), (B), (C), or (D)." 110 Stat. 1277. As noted above, petitioner is deportable by reason of having committed a criminal offense covered in Section 241(a)(2)(B)(i).

The AEDPA does not specify in terms whether Section 440(d) bars the Attorney General from acting on a petition for relief filed by an alien on or before the date of its enactment. But because the focus of a determination respecting discretionary relief is forward-looking[7]—and because the actual granting of relief is the action targeted by Congress[8]—it follows

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[7] See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the [alien's] right to remain in this country in the future."); see also *Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996) ("Like statutes altering the standards for injunctive relief," changes in the scope of the Attorney General's discretionary authority "ha[ve] only a prospective impact.").

[8] Just as new "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 511 U.S. at 274, Section 212(c) speaks to the power of the Attorney General to waive deportation, not to any right of an alien to obtain such relief. The principles underlying the immediate application of jurisdictional rules to pending cases thus apply equally in this context. See *Scheidemann*, 83 F.3d at 1523 ("Like statutes constricting the jurisdiction of a judicial body," changes to the class of aliens

that Section 440(d) is properly understood to have eliminated the Attorney General's power to provide relief in cases pending at the time of its enactment.[9]

Since the Attorney General lacks authority under current law to grant petitioner's application for a waiver of deportation under Section 212(c),[10] this case is moot.

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eligible for Section 212(c) relief "speak only to the power of a public agency.").

[9] The BIA held in *In re Soriano*, Interim Dec. No. 3289 (June 27, 1996), that Section 440(d) of the AEDPA did not eliminate its authority to provide relief in pending cases. At the request of the INS, however, the decision in *Soriano* was referred to the Attorney General for her review, see 8 C.F.R. 3.1(h), and by order dated September 12, 1996, the Attorney General vacated the BIA's opinion pending her further determination.

[10] We note that Section 304 of IIRIRA repeals Section 212(c) in its entirety and replaces it with a new Section 240A, which authorizes a form of discretionary relief termed "cancellation of removal." See IIRIRA § 304(a)(3) and (b) (*reproduced at* 142 Cong. Rec. H11,800 (daily ed. Sept. 28, 1996)). With certain limited exceptions not applicable here, IIRIRA's provisions respecting cancellation of removal apply, however, only to administrative proceedings initiated on or after April 1, 1997. See IIRIRA § 309(a) and (c) (*reproduced at* 142 Cong. Rec. H11,808 (daily ed. Sept. 28, 1996)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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